

INACCESSIBLE JUSTICE: HUMAN RIGHTS, PERSONS WITH DISABILITIES AND THE LEGAL SYSTEM

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I. ABSTRACT

This paper focuses on the important concept of access to justice and what it means to persons with disabilities. It also addresses how the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) provides for awareness of the requirements to provide access to justice for persons with disabilities.

Part II seeks to answer the question of what is access to justice and why it is important for persons with disabilities. "Access to Justice" is a broad concept, encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice. Persons with disabilities have often been denied access to fair and equal treatment before courts, tribunals, law enforcement officials, prison systems, and other bodies that make up the justice system in their country, because they have faced barriers. Additionally, persons with disabilities have been discriminated against in terms of attaining positions as lawyers, judges, and other officials in the justice system. Such barriers not only limit the ability of persons with disabilities to use the justice system, but also limit their ability to contribute to the administration of justice to

society and to the community as a whole. This important right is enumerated in Article 13 of the CRPD.

Part III outlines the legal framework in which this right is developed. Subpart A explores the right under the CRPD. Subpart B outlines the comparable right in other international conventions and Subpart C makes a similar analysis under regional treaties. The right of access to justice is intrinsic to all human rights treaties. The citations to specific provisions and the interpretations of these provisions by the various treaty Committees provides guidance on the development of a formulation of this right in Article 13 of the CRPD by the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee), and other international bodies. The various treaty Committees also provide guidance for States Parties to the CRPD as they implement its provisions.

Part IV highlights specific areas of denials of access to justice for persons with disabilities. Subpart A addresses the denials to persons with disabilities as people who seek to learn about or seek to obtain information about how the justice system works. Subpart B explores denials of justice to Disabled People's Organizations (DPOs) advocating for disability rights. Subpart C addresses the barriers persons with disabilities face as clients generally. Subpart D explores the exclusion of persons with disabilities from positions as lawyers. Subpart E documents the ongoing exclusion of persons with disabilities as jurors. Subpart F explores the barriers to access to the courthouse. Subpart G enumerates the situations persons with disabilities face as criminal defendants and prisoners, and Subpart H outlines the problems confronted by those who are victims of crime.

Part V briefly outlines some common barriers to disability inclusion in rule of law and justice reform programming. Access to justice is often addressed in rule of law and justice reform programming conducted by international donors and implementing partners. Regrettably, many of these programs ignore the interests of persons with disabilities in designing their programs, despite the mandate to do otherwise, as contained in the CRPD and in the donors' own guidelines.

Part VI outlines effective strategies for achieving inclusion of disabled persons in rule of law and justice reform programming. These suggestions are detailed in several categories: Subpart A discusses legal analysis, research and institution reform; Subpart B emphasizes the role of training judges, lawyers, and other justice professionals; Subpart C describes the methods that might increase the number of judges and lawyers with disabilities; Subpart D relates to the role of Disabled Persons and DPOs in such efforts; Subpart E describes needed reforms in the criminal justice system; Subpart F explores techniques for community education and

awareness; and Subpart G outlines reforms in the essential element of physical access to courts and judicial tribunals.

Part VII sets forth conclusions and recommendations moving forward, with a focus on the roles of the CRPD committee, States Parties, and disabled persons and DPOs.

II. WHAT IS ACCESS TO JUSTICE AND WHY IS IT IMPORTANT TO PERSONS WITH DISABILITIES?

“Access to Justice” is a broad concept, encompassing peoples’ effective access to the systems, procedures, information, and locations used in the administration of justice. People who feel wronged or mistreated in some way usually turn to their country’s justice system for redress. In addition, people may be called upon to participate in the justice system, for example, as witnesses or as jurors in a trial. Persons with disabilities have often been denied access to fair and equal treatment before courts, tribunals, law enforcement officials, prison systems, and other bodies that make up the justice system in their country because they have faced barriers. Additionally, persons with disabilities have been discriminated against in terms of attaining positions as lawyers, judges, and other officials in the justice system. Such barriers not only limit the ability of persons with disabilities to use the justice system, but also limit their ability to contribute to the administration of justice to society and to the community as a whole. Thus, Article 13 of the CRPD explicitly references the right of persons with disabilities to access to justice.¹

One expert working on women’s access to justice highlights the trend towards thinking of access to justice as three distinct, yet interdependent components:

[S]ubstantive justice which concerns itself with an assessment of the rights claims that are available to those who seek a remedy; procedural aspects which focus on the opportunities and barriers to getting ones claim into court (or other dispute resolution forum); and, the symbolic component of access to justice which steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment.²

1. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, art. 13, U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD].

2. International Development Research Centre, Background Paper on Women’s Access to Justice in the MENA Region, 2007, *available at* http://www.idrc.ca/.../12151851101Women's_access_to_justice_in_MENA-Bahdi_En.doc (last visited Feb. 23, 2011).

This author also prefers a bifurcated relationship to the law, which recognizes it both as a source of oppression and liberation. This image of law is preferable because it reflects and presupposes a particular image of marginalized peoples as both objects of oppression, and yet not entirely powerless makers of their own significance. This bifurcated relationship to the law also captures the law's true complexity. Law can offer hope to those who find little hope in the realm of economics, politics, or social status.

This is the reality of the justice system for persons with disabilities as well, since sometimes the justice system remedies inequality and discrimination, and sometimes it is the justice system itself that perpetuates that very inequality and discrimination. While advocating for improved access to justice, disability rights activists must not ignore other mechanisms for advancement such as human rights, education, media engagement, grassroots empowerment, mobilization, budgetary analysis,³ and advocacy. As disability rights activists work to gain access to the justice system, these harsh realities must be kept in mind.

Nonetheless, the ability to access justice is of critical importance in the enjoyment of all other human rights and in the fair and effective administration of justice. For example, a person with a disability who feels that she or he has been denied the right to work⁴ may wish to turn to the justice system to seek a remedy. However, if the justice system fails to

3. Budget analysis refers to a process by which State allocation of resources are scrutinized and assessed, for example, to identify sufficiency of resource allocation in the attempt to secure the rights of a particularly disadvantaged group. See Maria Socorro I. Diokno, *A Rights-Based Approach to Budget Analysis*, 8 (1999), available at <http://www.crin.org/docs/resources/publications/hrbap/RBABudgetAnalysis.pdf> (last visited Feb. 22, 2011); Fundar-Centro de Análisis e Investigación, International Human Rights Internship Program, International Budget Project, *Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights*, 1 (2004), available at <http://www.law.washington.edu/wlr/notes/83washlrev449n46b.pdf> (last visited Feb. 22, 2011). For the role of budget analysis in the realm of women's rights, see Debbie Budlender & Rhonda Sharp, *How To Do a Gender-Sensitive Budget Analysis: Contemporary Research and Practice*, 5, 57 (1998), available at <http://www.llbc.leg.bc.ca/Public/PubDocs/docs/360141/AusAIDTr.pdf> (last visited Mar. 26, 2011). Budget analysis has also been stressed in the context of State reporting obligations on the implementation of economic, social, and cultural rights. See U.N. Econ. & Soc. Council, Limburg Principles on the Implementation of Economic, Social and Cultural Rights, No. 79, U.N. Doc. E/CN.4/1987/17 (Jan. 8, 1987), which states:

Quantitative information should be included in the reports of States Parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be presented in such a way as to facilitate the assessment of the compliance with Covenant obligations. States Parties should, where possible, adopt clearly defined targets and indicators in implementing the Covenant.

4. CRPD, *supra* note 1, art. 27.

accommodate her or his physical, communication, or other disability-related needs, and/or expressly discriminates against her or him, then clearly denial of access to the justice system also results in denial of protection of the right to work. Similarly, a person with a disability who has been the victim of a crime may wish to report the crime to the police and press charges against the offender.⁵ However, if she or he is denied physical access to the police station, clear communication with the police, or access to information that is understandable, then that person may not be able to exercise her or his rights as a victim. These examples demonstrate that human rights are indivisible, interdependent, and interconnected.

The enjoyment of other human rights can also positively or negatively impact the ability of persons with disabilities to enjoy access to justice. Accessibility⁶ of transportation may determine whether or not a person with a disability is able to travel to a police station, courthouse, or other place where justice is administered. Similarly, a person with a disability who has had access to a quality education⁷ will be better able to understand and use the justice system. However, if she or he has been denied the right to education, then participation in the justice system may be difficult or impossible. Additionally, if formal legal education is denied to persons with disabilities, they will be unable to work as lawyers or serve as judges who can integrate the views and experiences of disabled persons in the justice system. Without the right to political participation,⁸ persons with disabilities will not be able to run for office, or vote for or campaign for candidates who support their access to the justice system.

To be fully included in society, persons with disabilities need access to justice. As long as persons with disabilities face barriers to their participation in the justice system, they will be unable to assume their full responsibilities as members of society or vindicate their rights. For this reason, it is important that barriers be removed so that persons with disabilities can enjoy the equal opportunity to perform their duties as parties, witnesses, jurors, lawyers, prosecutors, judges, arbitrators, and other participants in the administration of justice. It is also important for persons with disabilities to enjoy the myriad of civil, political, economic, social, and cultural rights enumerated in the CRPD, as well as being treated fairly and equitably in the administration of justice itself.

5. *Id.* arts. 15–6.

6. *Id.* art. 9.

7. *Id.* art. 24.

8. *Id.* art. 29.

For example, with respect to economic, social, and cultural rights, a significant study by the Office of the High Commissioner for Human Rights states:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the context of the other major human rights treaties. Administrative remedies might in certain cases be adequate to vindicate rights. In other cases, judicial protection of rights appears indispensable in order to satisfy the requirement of the Convention, and should extend to economic, social and cultural rights, besides civil and political rights.⁹

III. THE LEGAL FRAMEWORK

A. *Under the United Nations Convention on the Rights of Persons with Disabilities*

The CRPD, the first human rights treaty of the 21st Century, became the first international instrument by which persons with disabilities could enforce their human rights. The CRPD also incorporated a transformative view of disability, moving away from the “medical model” of disability toward a “social model” of disability. Noted disability human rights scholars, Michael Stein and Janet Lord, emphasize the fact that:

[t]he Convention categorically affirms the social model of disability in relation to persons with disabilities by describing it as a condition arising from “interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others instead of condition arising from inherent limitations.”¹⁰

Access to justice is a fundamental human right and has long been a concern to persons with disabilities. People vigorously engaged in the negotiations of the CRPD understand this long history of denial of access to justice, and as aptly stated by Katherine Guernsey, “Article 13 seeks to

9. Office of the United Nations High Commissioner for Human Rights And Reports of the Office of the High Commissioner and the Secretary-General, *Thematic Study: Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities*, A/HRC/10/48, 10th Sess., Jan. 26, 2009, ¶ 57 (2009).

10. Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 460 (2008) (quoting CRPD, *supra* note 1, art. 1).

respond to the historic exclusion, in many societies, of persons with disabilities from the justice system.”¹¹ As the renowned scholar Anna Lawson has noted, when these rights are denied, the result is the “civil death” of the person affected.¹² As highlighted by the UN Development Program, access to justice has ramifications far beyond the justice system itself.

There are strong links between establishing democratic governance, reducing poverty, and securing access to justice. Democratic governance is undermined where access to justice for all citizens (irrespective of [disability,] gender, race, religion, age, class or creed) is absent. Access to justice is also closely linked to poverty reduction since being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making. Lack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability.¹³

The CRPD enumerates many general obligations that States Parties must adhere to. For example, States Parties have to give full effect to these rights, they have to ensure that laws and practices do not discriminate against persons with disabilities, and they have to make sure to change those laws that do so discriminate against persons with disabilities.¹⁴ The

11. Katherine Guernsey, Marco Nicoli & Alberto Ninio, *World Bank, Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank*, SP Discussion Paper No. 0712, June 2007, at 13, available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Disability-DP/0712.pdf> (last visited Feb. 22, 2011).

12. Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT’L. L. & COM. 563, 573 (2007).

13. See Access to Justice: Practice Note, United Nations Development Programme (Sept. 3, 2004), at 3, http://www.undp.org/governance/docs/Justice_PN_English.pdf (last visited Mar. 26, 2011) [hereinafter Access to Justice].

14. CRPD, *supra* note 1, art. 4. Article 4 on General Obligations provides:

States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention; (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities

CRPD also incorporates the dynamic, intersecting, and over-arching rights of “equality before the law”¹⁵ such as: the importance of eliminating stereotypes of persons with disabilities,¹⁶ accessibility,¹⁷ equal recognition before the law” (often framed as “legal capacity”),¹⁸ and the concept of “access to justice” for persons with disabilities.¹⁹ Additionally, the CRPD includes the right to education,²⁰ non-discrimination, and reasonable accommodation in employment.²¹

15. *Id.* art. 5. Article 5 on Equality and Non-discrimination provides:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

16. *Id.* art. 8. Article 8 on Awareness-raising provides:

1. States Parties undertake to adopt immediate, effective and appropriate measures: (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; (c) To promote awareness of the capabilities and contributions of persons with disabilities. 2. Measures to this end include: (a) Initiating and maintaining effective public awareness campaigns designed: (i) To nurture receptiveness to the rights of persons with disabilities; (ii) To promote positive perceptions and greater social awareness towards persons with disabilities; (iii) To promote recognition of the skills merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market; (b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities; (c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention; (d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

17. *Id.* art. 9.

18. *Id.* art. 12.

19. CRPD, *supra* note 1, art. 13.

20. *Id.* art. 24. Article 24 on Education provides:

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning directed to: (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; (b) The development by persons with disabilities of

their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; (c) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that: (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability; (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live; (c) Reasonable accommodation of the individual's requirements is provided; (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education; (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including: (a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; (c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

21. *Id.* art. 27. Article 27 on Work and Employment provides:

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the

Article 12 of the CRPD states: “1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”²²

Article 13, Access to Justice states:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote

course of employment, by taking appropriate steps, including through legislation, to, inter alia: (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances; (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others; (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business; (g) Employ persons with disabilities in the public sector; (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace; (j) Promote the acquisition by persons with disabilities of work experience in the open labour market; (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities. 2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

22. *Id.* art. 12.

appropriate training for those working in the field of administration of justice, including police and prison staff.²³

Persons with disabilities also have the right to employment with reasonable accommodation in the justice sector as lawyers, judges, law enforcement officials, and other justice sector employment on an equal basis with others.²⁴ Often, a pre-requisite to the ability to exercise the right to equal employment opportunity, is the right to education,²⁵ since appropriate professional education is necessary to assume positions in the justice system.

B. Under Other International Conventions

The right of access to justice is intrinsic to all human rights treaties. The citations to specific provisions and the interpretations of these provisions, by the various treaty committees, provide guidance on the development of a formulation of this right in Article 13 of the CRPD. Article 13 also provides guidance for States Parties to use the CRPD and how to implement its provisions.

Access to justice was first formally referenced in the formative human rights document, the Universal Declaration of Human Rights (UDHR); although the term "access to justice" was not specifically used to label this right therein. Several articles of the UDHR enumerate these rights: Article 7 concerning equality before the law and equal protection of the law,²⁶ Article 8 stating that all have the right to an effective remedy,²⁷ and Article

23. *Id.* art. 13.

24. CRPD, *supra* note 1, art. 27. Article 27 provides:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.

25. *Id.*

26. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III), art. 7 (Dec. 10, 1948). Article 7 provides that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

27. *Id.* art. 8. Article 8 provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

10²⁸ expressing the basic right of the individual to a fair trial in both civil and criminal proceedings.²⁹

The International Covenant on Civil and Political Rights (ICCPR) sets forth this right in Article 14, which states in pertinent part: “all persons shall be equal before the courts and tribunals.”³⁰ ICCPR Article 14(2)(f), states with respect to criminal proceedings: “to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”³¹ ICCPR Article 16 states: “everyone shall have the right to recognition everywhere as a person before the law.”³²

The Human Rights Committee, the committee that monitors compliance with the ICCPR, in its General Comment No. 13 recognizes the importance of communication in judicial processes in a language a person can understand:

Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defense.³³

Clearly, this concept provides the requisite reasonable accommodation that allows a defense to persons who are deaf and use sign language to communicate with others, and to persons who are blind and cannot read standard print. The Human Rights Committee in its General Comment 13 further defines what fulfillment of the Article 14 equality before a tribunal under the ICCPR.

Paragraph 3 states in pertinent part:

28. *Id.* art. 10.

29. *Id.* Article 10 provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him.”

30. International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

31. *Id.* art. 14(2)(f).

32. *Id.* art. 16.

33. United Nations, Office of the High Commissioner for Human Rights, CPR General Comment No. 13: Article 14 (Administration of Justice) Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, ¶ 13 (Apr. 13, 1984), available at <http://www.unhchr.ch/tbs/doc.nsf/0/bb722416a295f264c12563ed0049dfbd?Opendocument> (last visited Mar. 26, 2011).

The Committee would find it useful if, in their future reports, States Parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States Parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.³⁴

Although the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a specific access to justice provision, a general comment of the Committee on Economic, Social and Cultural Rights recognizes that an effective judicial or administrative remedy is "indispensable."³⁵ Paragraph 9 of General Comment 9 under the ICESCR states:

The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right

34. *Id.* ¶ 3.

35. U.N. Econ. & Soc. Council, General Comment 9: The Domestic Application of the Covenant, ¶¶ 9-10, U.N. Doc. E/C/1998/24 (Dec. 3, 1998).

cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.³⁶

Paragraph 10 states:

In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.³⁷

The Committee has already made it clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights, which puts them beyond the reach of the courts, would be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.³⁸

The United Nations Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) also recognizes a right to equality before the law. Article 15 requires equality between men and women before the law and the courts.³⁹

36. *Id.* ¶ 9.

37. *Id.* ¶ 10.

38. *Id.* ¶ 9.

39. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180, art. 15 (Dec. 18, 1979). Article 15 provides:

1. States Parties shall accord to women equality with men before the law.

The Committee for the Convention on Discrimination Against Women (CEDAW Committee), in its General Comment 21, explained the paramount importance of the rights of women in the justice system:

A woman's right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the courts. In others, her status as a witness or her evidence is accorded less respect or weight than that of a man. Such laws or customs limit the woman's right effectively to pursue or retain her equal share of property and diminish her standing as an independent, responsible and valued member of her community. When countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependents.⁴⁰

For example, the CEDAW recognizes that without access to justice there is no remedy for women to address gender-based violence.⁴¹ The Convention for the Elimination of Racial Discrimination (CERD), in Article 5, also recognizes the right to equality before the law, the right to equal treatment before tribunals, and all other elements of the justice system.⁴²

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

40. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS: EQUALITY IN MARRIAGE AND FAMILY RELATIONS, CEDAW General Recommendation No. 21, 13th Session, cmt. 7, (Apr. 2, 1994).

41. *Id.*

42. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106(XX), art. 5(a) (Dec. 21, 1965). Article 5 provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone,

The Committee for the Elimination of Racial Discrimination (CERD Committee) General Comment No. 20 to Article 5 of the CERD states: "Many of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State"⁴³

Additionally, the wording of the CERD Committee's General Recommendation No. 25 usefully illustrates the notion of multiple discrimination based on race and other grounds.⁴⁴ The CERD Committee notes, for example, "racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men"⁴⁵ and "certain forms of racial discrimination may be directed towards women specifically because of their gender"⁴⁶

It certainly would be useful for the CRPD Committee to examine the multi-dimensional aspects of access to justice, as it affects women with disabilities and persons with disabilities from other marginalized groups. International environmental law also incorporates concepts of access to justice. For example, the Convention on Access to Information, Public Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), in addition to addressing environmental matters, also addresses government accountability, transparency, and responsiveness through provisions on information, public participation, and access to justice.⁴⁷ With respect to access of information provisions, for example, the Aarhus Convention ensures that individuals have access to review procedures before a court of law or another independent and impartial body, which may be free of charge or inexpensive.⁴⁸ Additionally, the Convention on Access to Information provides access to administrative or judicial procedures that allows individuals to challenge acts and omissions

without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
(a) The right to equal treatment before the tribunals and all other organs administering justice.

43. U.N. Rep. of the Comm. on the Elimination of Racial Discrimination, G.A. 51st Sess., at 124, U.N. Doc. A/51/18 (Sept. 30, 1996).

44. U.N. Rep. of the Comm. on the Elimination of Racial Discrimination, G.A. 55th Sess., at 152, U.N. Doc. A/55/18 (Oct. 17, 2000).

45. *Id.*

46. *Id.*

47. Convention on Access to Information, Public Decision-making and Access to Justice in Environmental Matters, art. 9, June 25, 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517 (1999).

48. *Id.* art. 9(2).

made by private persons and public authorities that contravene environmental laws.⁴⁹

C. Regional Treaties

In addition to the various international human rights and other treaties outlined above, comparable access to justice provisions are contained in the regional human rights treaties. The 1948 American Declaration of the Rights and Duties of Man (American Declaration) provides that every individual in the member states of the Organization of American States (OAS) is entitled to enjoy basic civil rights, including the right to resort to the courts to ensure respect for her or his legal rights.⁵⁰ Article 8(1) of the 1978 American Convention on Human Rights (American Convention) entitles every individual in the ratifying Latin American states to a "hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature, and the determination of her or his rights and obligations of a civil, labour, fiscal, or any other nature."⁵¹

The due process rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) resembles the ICCPR.⁵² These conventions entitle everyone in the ratifying and acceding states to: a fair and public hearing by law in determining civil rights and obligations, and any criminal charges within a reasonable time, and to an independent, impartial, and lawfully established tribunal.⁵³

The American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities ensures for all persons with disabilities in ratifying states, that governments will take measures to

49. *Id.* art. 9. Article 9 of the Convention on Access to Information, Public Decision-making and Access to Justice in Environmental Matters provides great detail on the processes described in part below:

1. Each Party shall, within the framework of its national legislation, ensure that [aggrieved persons have] access to a review procedure before a court of law or another independent and impartial body established by law.

50. American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc 21 rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L. V/II.82, doc. 6 rev. 1, art. XVII (1992).

51. American Convention on Human Rights, Pact of San Jose, Costa Rica, art. 8(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, OAS/Ser. L/V/II.4 rev. 7 (*entered into force* July 18, 1978).

52. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. No. 5 (*entered into force* Sept. 3, 1953).

53. *Id.*

eliminate discrimination in the law enforcement and administration of justice.⁵⁴

The African (Banjul) Charter on Human and Peoples Rights (African Charter) entitles every individual in a ratifying state to have her or his cause heard, and to be tried within a reasonable time by an impartial court or tribunal.⁵⁵ The 2004 Revised Arab Charter on Human Rights (revised Arab Charter) proclaims that everyone is entitled to a fair trial that affords adequate guarantees before a competent, independent court.⁵⁶

IV. HIGHLIGHTS OF SPECIFIC AREAS OF DENIALS OF ACCESS TO JUSTICE FOR PERSONS WITH DISABILITY

There are numerous ways in which persons with disabilities are denied access to justice. These numerous denials are demonstrated when obtaining information on the justice system and advocating for reforms through the DPOs. In addition, individuals are affected in the way they are treated as clients by lawyers and by the justice system. These denials also prevent them the opportunity to be employed as lawyers or to serve as prosecutors and judges. It further prevents them from assuming the societal responsibility to serve as jurors, due to physical inaccessibility and attitudinal barriers in the courthouse, as well as other elements of the justice system. Lastly, they are denied participation in the justice system as defendants and prisoners, and equal treatment by the justice system as victims of crimes.

A. As People Seeking to Learn About or to Obtain Information on How the Justice System Works

As poignantly stated by the United Nations Development Program:

Legal awareness is the foundation for fighting injustice. The poor and other disadvantaged people cannot seek remedies for injustice when they do not know what their rights and entitlements are under the law. Information on remedies for injustice must be intelligible to the public and

54. Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, AG/RES. 1608 (XXIX-O/99), art. III(1)(a) (June 7, 1999).

55. African (Banjul) Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 7(1) (June 27, 1981) (*entered into force* Oct. 21, 1986).

56. League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) (*entered into force* Mar. 15, 2008); *see also* Don Fleming, *Legal Aid and Human Rights*, INT'L LEGAL AID GROUP CONF., June 6-8, 2007, *available at* http://www.ilag.net.org/jscripts/tiny_mce/plugins/filemanager/files/Antwerpen_2007/Conference_Papers/Legal_Aid_and_Human_Rights.pdf (last visited Feb. 22, 2011).

knowledge provided to them must serve their practical purposes.⁵⁷

Information on human rights, the legal system, and how to vindicate those rights are rarely available to persons with disabilities in accessible formats. Such information is also neither produced in user-friendly formats nor in plain language.

B. As a Member of a Disabled Persons Organization Advocating for Disability Rights

The “nothing about us without us” philosophy intrinsic in the CRPD is reflected in the DPOs involvement in the development of laws, policies, and procedures that gives access to justice for persons with disabilities.⁵⁸

C. As Clients Generally

Remedies for violations of human rights often require the intervention of lawyers. The expense of obtaining the services of legal counsel and legal processes often discourages those who cannot afford them from seeking just remedies. Availability, affordability, and adequacy are the three major challenges to obtaining legal assistance faced by marginalized groups. A fourth barrier for persons with disabilities is the lack of knowledge by legal professionals of how to work with clients with disabilities, and a lack of knowledge of the legal concerns faced by persons with disabilities.

In addition to the general access to justice issues confronting persons with disabilities, often poverty prevents persons with disabilities from utilizing the civil justice system because they simply cannot afford the

57. Access to Justice, *supra* note 13, at 10.

58. CRPD, *supra* note 1, pmbl., §§ (m), (o), art. 4(3). Section (m) states:

Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty.

Section (o) states: “Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them.” Article 4(3) states: “In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.”

services of a lawyer. Frances Gibson in her paper on the CRPD Article 13 argues that access to justice would be meaningless without the right to free legal aid, and that this is even more important for persons with disabilities because of their lack of knowledge of the legal system and their extreme poverty.⁵⁹ She references the 1975 Declaration on the Rights of Disabled Persons, which recognizes that a right to legal aid is indispensable:⁶⁰ “Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.”⁶¹

Although Ms. Gibson concludes that persons with disabilities are clearly entitled to free legal representation in criminal matters, she expresses concern that this right must also apply in civil matters.⁶² She notes that:

If Article 13 of the CRPD is to have any meaning, then it follows that—in the absence of forums which are simple enough in both procedure and substantive law to allow disabled citizens to have a fair hearing without the assistance of a lawyer—the convention requires states to provide legal aid to people with disabilities who cannot access private legal assistance and that, at a minimum, legal aid should be available for cases involving breaches of the human rights referred to in the treaty.⁶³

Generally, in law schools, lawyers are not trained on disability law or on how to work with clients with disabilities.⁶⁴ Most lawyers do not employ sign language interpreters to aid with deaf clients and they do not have materials for persons who are blind. They also have little experience

59. Frances Gibson, *Article 13 of the Convention on the Rights of Persons with Disabilities—A Right to Legal Aid?*, 15 AUSTL. J. OF HUM. RTS. 123, 131 (2010).

60. *Id.* at 128.

61. Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. GAOR., U.N. Doc A/RES/3447(XXX), art. 11 (Dec. 9, 1975).

62. Gibson, *supra* note 59, at 129.

63. *Id.* at 131 (citing *Kyiv Declaration on Legal Aid*, Conference on the Protection and Promotion of Human Rights through Provision of Legal Services, art 6, available at http://www.ahrcentre.org/documents/Publications/15_ajhr_2.pdf#page=133 (last visited Mar. 26, 2011)). “Recognising the right to redress for violations of human rights—Legal aid should be available to all people without discrimination who seek legal redress for violation of their human rights, including for violations by any organ of state.” *Id.*

64. Gibson, *supra* note 59, at 128.

working with disabled persons and minimal understanding of the so-called “disability etiquette,” which helps in addressing and interacting with persons with disabilities.

For example, Michael Schwartz, a well-respected deaf lawyer, provides detailed guidance to attorneys who are working with clients with hearing disabilities, including the types of communications devices to use, methods of communication, styles of speaking, etc.⁶⁵ He also highlights the fact that sign language interpreters are bound to keep all communications confidential, but some have concerns about the use of interpreters with respect to the confidentiality of the lawyer-client relationship.⁶⁶ Mr. Schwartz also points out that when the court appoints an attorney to a deaf client, it must also appoint an interpreter.⁶⁷ Family members and close friends should not serve this purpose because it would deprive them of their attorney-client privilege to confidential communications. Also, interpreters who know the client may use their own knowledge or opinion to influence communications.⁶⁸

The International Criminal Court⁶⁹ requires taking into account the needs of all victims, including persons with disabilities.⁷⁰ Under Rule 102, on communications other than in writing, “[w]here a person is unable, due to a disability or illiteracy, to make a written request, application, observation or other communication to the Court, the person may make such request, application, observation or communication in audio, video or other electronic form.”⁷¹

Furthermore, in detailed guidance to counsel appearing before the International Criminal Court, one provision states:

When a Client’s ability to make reasonably considered decisions in connection with his or her representation is impaired because of minority, mental disability or any other reason, Counsel must:

65. See MICHAEL SCHWARTZ, *SERVING HEARING-IMPAIRED CLIENTS*, BARRISTER (1991).

66. *Id.*

67. *Id.*

68. *Id.*

69. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998).

70. INT’L CRIM. CT., RULE OF PROC. AND EVID. 102, Official Records ICC-ASP/1/3 (2002), available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf (last visited Feb. 23, 2011).

71. *Id.*

- (a) Inform the Presiding Judge or Chamber of the Court hearing the matter, if any, of the disability;
- (b) Take such steps as are necessary to ensure the adequate legal representation of such Client; and
- (c) As far as reasonably possible maintain a normal Counsel-Client relationship with the Client.⁷²

These provisions are preliminary steps in addressing how persons with disabilities should be treated in the context of the International Criminal Court. It is rather disheartening that this tribunal has not adopted more appropriate and disability-sensitive approaches in light of the fact that war and conflict result in an increase in the population of persons with disabilities, since the International Criminal Court might well be a tribunal before which such persons will need to appear.

D. As Lawyers

Persons with disabilities rarely work as lawyers, even in developed countries. Indeed, historically, persons with disabilities were barred from the occupation. Law schools tended not to admit applicants with disabilities and even to this day, law school entrance exams are not accessible to those applicants. Employment is limited by many factors, including that bar exams present challenges to many because of inaccessibility of the exam, attitudinal barriers posed by employers, unavailability of reasonable accommodations, and other factors. Data on the numbers of law students and lawyers with disabilities in the United States demonstrates the need for change. According to the National Association for Law Placement (NALP), “for the class of 2007, 494 law students of a total of 37,000 graduates reported that they were disabled, which is about 1.5 percent reporting a disability.”⁷³ “For 2008–2009, the ABA Office of Legal Education and Admissions to the Bar indicated that, of 152,005 law students in ABA accredited law schools, 4,111 (2.7 percent) were provided accommodations.”⁷⁴

72. INTERNATIONAL BAR ASSOCIATION, THE CODE OF PROFESSIONAL CONDUCT FOR COUNSEL APPEARING BEFORE THE INT’L CRIM. CT., *available at* <http://www.envoyco.com/clients/iba/english.pdf> (last visited Feb. 23, 2011). This guidance is somewhat patronizing, but at least raises the fact that witnesses and clients in matters before the International Criminal Court often are persons with disabilities requiring accommodations in the proceedings.

73. ABA Report on the Second Nat’l Conf. on the Emp. of Lawyers with Disabilities, June 16–25, 2009, at 22, *available at* <http://new.abanet.org/disability/PublicDocuments/09report.pdf> (last visited Feb. 23, 2011).

74. *Id.*; see also Barry E. Katz, *Disabled, Not Disqualified—With Proper Accommodations, Law Students with Disabilities Can Succeed in Law School and Their Careers*, STUDENT LAWYER MAG., Sept. 2001, at 22 and Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students*

A careful review of these statistics on law students with disabilities reveals the poor data collection. With respect to employment, only 0.25 percent of partners, 0.17 percent of associates, and 0.23 percent of all lawyers at NALP firms reportedly have disabilities.⁷⁵ Of more than 9,000 summer associates in 2009 at NALP firms, only 9 reported having disabilities.⁷⁶

The ABA Commission on Mental and Physical Disabilities reports that Dr. Douglas Kruse of Rutgers University and the National Bureau of Economic Research notes that out of the 1.08 million Americans who are lawyers or judges, magistrates, and other judicial workers, only 3.8 percent have a reported disability.⁷⁷ The Bureau of Labor Statistics has different statistics, reporting that for the third quarter of 2009 (July, August, and September), 2.6 percent of those employed in the legal occupation (*e.g.*, lawyers, judges, magistrates, law clerks, court reporters, paralegals) had a disability.⁷⁸ Yet persons with disabilities represent an estimated ten percent of the population. These figures point to a profound underrepresentation of lawyers and law students with disabilities in the United States in the profession, as well as issues with disclosure of disability, professional choice, and concerns about hiring, retention, and promotion. The problem is multifaceted—the pipeline from college to law school and career, and attitudinal barriers within the profession itself.

E. As Jurors

The responsibility to serve on juries is a fundamental right in most countries. When persons with disabilities are denied this right they are denied the opportunity to serve their communities. Although some of the legal barriers to jury service have been removed in some countries, other barriers still exist. In a recent article, Ms. Natasha Azava asserted: “People with disabilities have long been denied the right to be on a jury.”⁷⁹ Until

with Disabilities, Non-Traditional Learners, and the Law Teacher as a Learner, 6 NEV. L.J. 116, 122 (2005).

75. National Association for Legal Career Professionals, *Diversity Demographics, Reported Number of Lawyers with Disabilities Remains Small*, NALP BULL., Dec. 2009, available at <http://www.nalp.org/dec09disabled> (last visited Feb. 23, 2011).

76. *Id.*

77. ABA Comm. on Mental and Physical Disability, ABA Disability Statistics—2010, at 4, available at <http://new.abanet.org/disability/PublicDocuments/ABADisabilityStatisticsReport.pdf> (last visited Feb. 23, 2011).

78. *Id.*

79. Natasha Azava, *Disability-Based Peremptory Challenge: Need for Elimination*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 121, 121 (2006) (citing Mary A. Lynch, *The Application of Equal*

recently, in the United States, state laws describing jury qualifications “entirely excluded people with any disabilities.”⁸⁰ Moreover, practical barriers such as: “inaccessible courtrooms, difficulty in obtaining transportation to court, and a lack of reasonable accommodations such as sign interpreters or assistive communication devices,” made their participation in jury service impractical.⁸¹

Although outright prohibitions are now illegal in the United States, often a peremptory challenge is utilized and the author notes that a peremptory challenge “is one exercised without a reason stated, without inquiry and without being subject to the court’s control.”⁸² “In effect, parties can remove a potential juror even though she or he qualifies to serve under the statute.”⁸³ She further notes that peremptory challenges based on disability are still constitutional in the United States, and that the use of such challenges is based on ignorance and an unwillingness to evaluate the individual situation.⁸⁴

F. As Persons Seeking Access to the Courthouse

One of the most obvious barriers to access to justice for persons with disabilities is the physical barriers to the courts and other institutions of the justice system. This remains one of the most egregious problems. Courthouses, the symbols of the justice system, are often inaccessible in many ways. For example, inaccessibility includes: steps to and inside the courthouse, inaccessible witness chairs and jury boxes, lack of technology to enable persons with disabilities to understand the proceedings, prohibitions on animals in the courthouse despite the fact that they are service animals, and other elements of courthouse design. Increasingly world-wide persons with disabilities and DPOs are fighting to remove these barriers.

Esthe Muller, a South African lawyer and also a wheelchair user, filed suit under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 against the Justice Department and the Department of Public Works because of the inaccessibility of the

Protection to Prospective Jurors with Disabilities: Will Batson Cover Disability-Based Strikes?, 57 ALB. L. REV. 289, 298 (1993)).

80. Azaya, *supra* note 79 (citing Lynch, *supra* note 79, at 298).

81. *Id.* (citing Lynch, *supra* note 79, at 299).

82. *Id.* at 123–24 (citing Swain v. Alabama, 380 U.S. 202, 220–22 (1965)).

83. *Id.* at 124.

84. *Id.* at 124–25 (citing Lynch, *supra* note 79, at 303).

courthouses.⁸⁵ Ms. Muller had to be carried down a flight of stairs to enter the courthouse and on another occasion the court had to postpone her cases because she could not get into the room.⁸⁶ In September 2004, the South African Equality Court reached a final settlement in which the two government departments admitted that they had failed to provide proper wheelchair access and that this was a form of unfair discrimination against Ms. Muller and other people with similar accessibility needs.⁸⁷ The departments committed to a plan to ensure that all court buildings throughout the country would be made accessible within three years.⁸⁸

Several individuals with disabilities who were paraplegic and who used wheelchairs filed action for damages and equitable relief, alleging violations of the Americans with Disabilities Act in terms of physical access to the courts.⁸⁹ The United States Supreme Court found that when enacting this law, the U.S. Congress based it on extensive evidence of the “unequal treatment of disabled persons in the administration of judicial services and that this has persisted despite several state and federal legislative efforts to remedy the problem”⁹⁰ The Court also “[recognized] that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion.”⁹¹

The U.S. Access Board and the Canadian agency working on communication for persons with hearing disabilities have developed outstanding guides on how to make courthouses and their facilities and programs accessible to persons with disabilities.⁹² Professor Peter Blanck,

85. South African Government Information, *Equality Court Victory for People with Disabilities*, <http://www.info.gov.za/speeches/2004/04022415461001.htm> (last visited Feb. 23, 2011) [hereinafter South African Government Information]; see also Dave Reynolds, *Government Sets Date for All Courts to be Accessible*, INCLUSION DAILY EXPRESS, Sept. 15, 2004, <http://www.inclusiondaily.com/archives/04/09/15/091504sacourtaccess.htm> (last visited Feb. 27, 2011) [hereinafter Reynolds].

86. South African Government Information, *supra* note 85.

87. *Id.*

88. Reynolds, *supra* note 85.

89. *Tennessee v. Lane*, 541 U.S. 509, 512–14 (2004).

90. *Id.* at 530–32.

91. *Id.* at 510–12.

92. See U.S. Access Board, *Courthouse Access Advisory Committee Courtroom, Mock-Up*, <http://www.access-board.gov/caac/mock-up.htm> (last visited Feb. 27, 2011) (illustrating a model accessible courtroom); see also U.S. Access Board, *Courthouse Access Advisory Committee, Justice for All: Designing Accessible Courthouses, Recommendations from the Courthouse Access Advisory Committee* (Nov. 15, 2006), <http://www.access-board.gov/caac/report.pdf> (last visited Feb. 27, 2011). See generally Communication Access to Justice Services, *Building Capacity Within the Justice Sector to Provide Services to People Who Have Communication Disabilities, Outlining Strategies to Make Courts*

in a recent article, highlights the vast array of technological solutions available for the courtroom.⁹³ He highlights the fact that assistive technology can, in addition to providing access to individuals with disabilities, enhance the experience and accuracy of proceedings to non-disabled individuals, such as: jurors, judges, and attorneys.⁹⁴ “This is particularly true when courtroom technology embodies concepts of ‘universal design,’ which enables all participants to engage meaningfully in the proceedings.”⁹⁵

G. As Criminal Defendants and As Prisoners

Like all members of the community, persons with disabilities encounter the criminal justice system as defendants. Some studies indicate that there is a significant percentage of the population of individuals with disabilities incarcerated which are incarcerated in greater percentages than in the general population.⁹⁶ Individuals who are accused and/or convicted of a crime also must be afforded accessible programs and facilities that meet their needs. Some of these approaches are obvious. For example, in prisons, where inmate telephone calls are time-limited, the prison may be required to permit inmates who use TTY phones a longer period of time to make those calls, due to the slower nature of TTY communication. In addition, prisons must have accessible holding cells, including beds, benches, toilets, and bathing facilities. Indeed, the goal of rehabilitation and re-integration into the community after the sentence has been completed, demands that such programs and facilities are responsive to these concerns.

A significant study and guidance document by the United Nations Office of Drugs and Crime highlights the main needs and possible responses in line with international standards for persons with disabilities in prisons, along with other so-called “vulnerable groups.”⁹⁷ Rather than offering detailed guidance for use in a myriad of different economic and social contexts, the document aims to generate a deeper understanding of

Accessible to People Using Alternative Communications (AAC), <http://www.accpc.ca/ej-calc-01.htm> (last visited Feb. 27, 2011).

93. Peter Blanck, Ann Wilichowski & James Schmeling, *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 WM. & MARY BILL OF RTS. J. 825, 836 (2004).

94. *Id.*

95. *Id.*

96. See generally United Nations Office of Drugs and Crime, *Handbook on Prisoners with Special Needs*, at 80–81 (Criminal Justice Handbook Series 2009), available at <http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf> (last visited Feb. 27, 2011) [hereinafter U.N. Handbook on Prisoners with Special Needs].

97. *Id.*

the situation of vulnerable prisoners, to encourage new thinking and the development of appropriate strategies to address their care and supervision requirements.⁹⁸ The report also highlights the relevant international instruments, focusing specific attention on the United Nations Standard Minimum Rules for the Treatment of Prisoners.⁹⁹ The report notes that according to studies undertaken in a number of countries, fifty to eighty percent of prisoners have some form of mental disability.¹⁰⁰ This guidance advises that comprehensive management strategies need to be developed, and mechanisms put in place to ensure that they are implemented, to guarantee that prisoners with disabilities are treated in accordance with the requirements of international human rights standards, while their prospects of social reintegration are enhanced.

The guidance draws on the CRPD and states:

In order to ensure that persons with disabilities can access justice on an equal basis with others, relevant legislation and procedures need to be in place to ensure that persons with disabilities charged with or convicted of a criminal offence are not discriminated against in the criminal justice system. Prison sentences should be used as a last resort in all cases. This principle should be fundamental in deciding whether to imprison offenders with disabilities, and especially those who have committed non-violent offences, taking into account the level of care they are likely to receive in prisons. The difficulties people with disabilities face in society are magnified in prisons, given the nature of the closed and restricted environment and violence resulting from overcrowding, lack of proper prisoner differentiation and supervision, among others. Prison overcrowding accelerates the disabling process, with the neglect, psychological stress and lack of adequate medical care, characteristic of overcrowded prisons. In order to ensure the equal treatment of prisoners with disabilities and the protection of their human rights, prison authorities need to develop policies and strategies which address the needs of this group in prisons. Such policies should be informed by the United Nations Convention on the Rights of Persons with Disabilities and national legislation, and address issues such as staff training, classification, accommodation, health care, access to programmes and services, safety, preparation

98. *Id.*

99. *Id.*

100. *Id.*

for release, early conditional release and compassionate release, as a priority.¹⁰¹

Drawing on interviews with correctional officials, mental health experts, prisoners and lawyers, a report of Human Rights Watch identifies persons with psycho-social disabilities in prison—"their numbers, the nature of their illnesses, and the reasons for their incarceration"¹⁰² and "confinement in long-term segregation facilities, the way prisons respond to their self-mutilation and suicide attempts, and the services they receive upon release from prison"¹⁰³ are also issues to be considered with respect to prisoners with disabilities. This research by Human Rights Watch "reveals significant advances in mental health care services in some prison systems."¹⁰⁴ Prison healthcare officials face, however, "daunting obstacles—including facilities and rules designed for punishment."¹⁰⁵ "The current fiscal crisis in states across the country also threatens the gains that have been made."¹⁰⁶ However, in many prisons "deep-rooted patterns of neglect, mistreatment, and even cavalier disregard for the well-being"¹⁰⁷ of these individuals still persists.

A report by the Prison Reform Trust presents the findings of a major survey of prisoners with learning disabilities and learning difficulties, which explored their experiences of the criminal justice system.¹⁰⁸ Based on interviews, the study found that:

[b]efore being arrested: prisoners were almost twice as likely as the comparison group to have been unemployed. Over half had attended a special school and they were three times as likely to have been excluded from school as the comparison group. At the police station: less than a third of prisoners received support from an appropriate adult

101. U.N. Handbook on Prisoners with Special Needs, *supra* note 96, at 43.

102. Human Rights Watch, *Ill Equipped: U.S. Prisons and Offenders with Mental Illness*, at 1 (Oct. 21, 2003), <http://www.hrw.org/en/reports/2003/10/21/ill-equipped> (last visited Feb. 27, 2011) [hereinafter Human Rights Watch].

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Human Rights Watch, *supra* note 102, at 2.

108. See generally Jenny Talbot, *No One Knows Report and Final Recommendations, Prisoners' Voices: Experiences of the Criminal Justice System by Prisoners with Learning Disabilities and Difficulties* (Prison Reform Trust 2008), available at <http://www.wwda.org.au/talbot1.pdf> (last visited Feb. 27, 2011).

during police interview and half of prisoners with possible learning or borderline learning disabilities said they did not know what would happen once they had been charged. A few said they had been beaten or handled roughly by the police and felt manipulated into agreeing to a police interview without support. In court: over a fifth of prisoners did not understand what was going on in court; some didn't know why they were in court or what they had done wrong. Most prisoners said the use of simpler language in court would have helped. In prison: most prisoners had difficulties reading and understanding prison information, which often meant they did not fully understand what was going on or what was expected of them. They also had difficulties filling in prison forms, which for some meant missing out on things such as family visits, and going to the gym, or getting the wrong things delivered such as meals. Over half said they had difficulties making themselves understood. Prisoners frequently had difficulties accessing the prison regime, "including offending behaviour programmes, and spent long periods of time on their own with little to do." However, over half of prisoners said they attended education classes and those with possible learning or borderline learning disabilities were the most likely to say so. Prisoners with disabilities were five times as likely as the comparison group to have been subject to control and restraint techniques and were three times as likely to have spent time in segregation. Over half said they had been scared while in prison and slightly less than half said they had been bullied; none of the comparison group said they had been bullied. Prisoners were almost three times as likely as the comparison group to have clinically significant depression or anxiety.¹⁰⁹

Thus, prisoners with learning disabilities encounter unique problems.

H. As Victims of Crimes

Persons with disabilities are more vulnerable as victims of crimes from both strangers and persons who know them. However, the difficult experience does not end after the alleged crime is over, because often the police and other elements of the legal system treat persons with disabilities poorly when they seek to redress the wrong. Police stations are often inaccessible, police do not know how to work with victims with disabilities, sign language interpreter services are not available, and materials in

109. *Id.* at v-vi.

alternative formats for victims who are blind are not provided. Often the most serious barrier is that persons with disabilities are not believed or are not viewed as credible and reliable witnesses by police and prosecutors.

Unfortunately, little statistical data is available on crimes against persons with disabilities internationally. In 1998, the United States enacted the Crime Victims with Disability Awareness Act, Public Law 105-301 to address this gap in statistics.¹¹⁰ This act required the collection of crime statistics against persons with developmental disabilities.¹¹¹ A 2007 U.S. Department of Justice study concluded that persons with disabilities were victims of about 47,000 rapes, 79,000 robberies, 114,000 aggravated assaults, and 476,000 simple assaults.¹¹² Age-adjusted rate of nonfatal violent crime against persons with disabilities was 1.5 times higher than the rate for persons without disabilities.¹¹³ Females with a disability had a higher victimization rate than males with a disability; males had a higher rate than females among those without a disability.¹¹⁴ The history of this violence is well brought to light in a report by the Leadership Conference on Civil Rights, which stated:

Disability bias can also manifest itself in the form of violence—and it is imperative that a message be sent to our country that these acts of bias motivated hatred are not acceptable in our society. Numerous disability and criminology studies, over many years, indicate a high crime rate against people with disabilities. However, the U.S. Office on Crime Statistics reported in 2002 that in many cases, crime victims with disabilities have never participated in the criminal justice process, “even if they have been repeatedly and brutally victimized.”¹¹⁵

There are a number of challenges for disability-based hate crime reporting. For instance, hate crimes against people with disabilities are

110. Crime Victims with Disabilities Awareness Act of 1998, Pub. L. No. 105-301, 112 Stat. 2838 (1998) (codified at 42 U.S.C. § 3732).

111. *Id.*

112. ERIKA HARRELL & MICHAEL R. RAND, CRIME AGAINST PEOPLE WITH DISABILITIES (U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/capd07.pdf> (last visited Feb. 27, 2011).

113. *Id.*

114. *Id.*

115. Leadership Conference on Civil Rights, *Confronting the New Faces of Hate: Hate Crimes in America 2009, Hate Crimes Against Individuals with Disabilities*, <http://www.civilrights.org/publications/hatecrimes/disabilities.html> (last visited Feb. 27, 2011) [hereinafter *Confronting the New Faces of Hate*].

often never reported to law enforcement agencies.¹¹⁶ The victim may be ashamed, afraid of retaliation, or afraid of not being believed.¹¹⁷ The victim may be reliant on a caregiver or other third party to report the crime, who fails to do so.¹¹⁸ Or, the crime may be reported, but there may be no reporting of the victims' disability, especially in cases where the victim has an invisible disability that they themselves do not divulge.¹¹⁹

"Perhaps the biggest reason for underreporting of disability-based hate crimes is that disability-based bias crimes are all too frequently mislabeled as 'abuse' and never directed from the social service or education systems to the criminal justice system. Even very serious crimes—including rape, assault, and vandalism—are too frequently labeled 'abuse.'"¹²⁰

For a comprehensive bibliography on crimes against persons with disabilities, see the work of Michelle Armstrong.¹²¹ The unique crime experiences of women with disabilities are explored by Springtide Resources and by DAWN.¹²² With appropriate accommodations and support, women with disabilities can be successful in getting relief for the crimes against them in the legal system. A study by Cape Mental Health in South Africa, described a highly successful project.¹²³

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Confronting the New Faces of Hate, *supra* note 115.

121. See MICHELLE ARMSTRONG, VIOLENCE AND CRIMES AGAINST PEOPLE WITH DISABILITIES BIBLIOGRAPHY (Wyoming Inst. for Disabilities, Sept. 2008), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=michelle_armstrong (last visited Mar. 23, 2011).

122. Springtide Resources, Ending Violence against Women, Faces of Violence Against Women with Developmental Disabilities, <http://www.springtideresources.org/resources/show.cfm?id=12> (last visited Mar. 23, 2011); Vote for Equality, Q&A: How Are Women with Disabilities Discriminated Against?, <http://dawn.thot.net/election2004/caefs4.htm> (last visited Mar. 23, 2011).

123. Beverley Jo Dickman & Amanda Jane Roux, *Cape Mental Health, Complainants with Learning Disabilities in Sexual Abuse Cases: A 10-year Review of a Psycho-legal Project in Cape Town, South Africa*, 33 BRIT. J. OF LEARNING DISABILITIES 138, 143 (2005).

V. COMMON BARRIERS TO DISABILITY INCLUSION IN RULE OF LAW PROGRAMMING¹²⁴

Access to justice is often addressed in rule of law and justice reform programming conducted by international donors and implementing partners. Regrettably, many of these programs ignore the interests of persons with disabilities in designing their programs, despite mandates to do otherwise, as contained in the CRPD Article 32 on International Cooperation, and donor's own guidelines.¹²⁵ There are numerous examples of somewhat inclusive disability development policies, although most do not specifically address access to justice program implementation in a detailed manner. The World Bank has established policies for inclusive programming and issued a publication that examines recent policies of major multilateral and bilateral agencies, which they have employed to include disability in development aid and provides some examples of implementation.¹²⁶ Unfortunately, to date, it does not appear that any of these policies have resulted in significant inclusion of persons with disabilities as active participants in these entities' access to justice programs.

Several barriers to inclusion in rule of law and justice reform programming exist. For example, rule of law implementing partners have little awareness of disability issues or history of engagement with DPOs. Disability law and policy, at both domestic and international levels, are relatively new and therefore unfamiliar terrain for many donors and implementing partners engaged in rule of law programming. There are few role models for persons with disabilities in the legal field because of the inaccessibility of court houses, law schools, training venues, government offices, and police stations. Furthermore, persons with disabilities and

124. The more detailed discussions in this article of both barriers to and approaches to improving the inclusion of persons with disabilities in rule of law programming expands upon the earlier work outlined in JANET E. LORD, JERRY MINDES, STEPHANIE ORTOLEVA, MICHAEL STEIN & ALLISON DEFRANCO, *DISABILITY INCLUSION IN DEMOCRACY AND GOVERNANCE PROGRAMMING: STRATEGIES FOR WORKING ON DISABILITY ISSUES IN DEVELOPING COUNTRIES* (2010) (on file with author).

125. CRPD, *supra* note 1, art. 32.

126. See generally JANET LORD ET AL., *DISABILITY AND INTERNATIONAL COOPERATION AND DEVELOPMENT: A REVIEW OF POLICIES AND PRACTICES* (2010); Canadian International Development Agency, Gender Analysis, <http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/Eng/2D15BA48F56F13DE8525729B00510DA4?OpenDocument> (last visited Mar. 15, 2011); DEVELOPMENT FOR ALL: TOWARDS A DISABILITY-INCLUSIVE AUSTRALIAN AID PROGRAM 2009–2014 III (Australian Agency for International Development, Nov. 2008), available at <http://www.ausaid.gov.au/publications/pdf/dev-for-all.pdf> (last visited Mar. 15, 2011); FINLAND'S DEVELOPMENT POLICY PROGRAMME 2007: TOWARDS A SUSTAINABLE AND JUST WORLD COMMUNITY 16 (Ministry of Foreign Affairs of Finland, 2007), available at <http://formin.finland.fi/Public/download.aspx?ID=24014&GUID={41C62727-0F60-4794-B744-F40E9460D79F}> (last visited Mar. 15, 2011).

DPOs may have little experience in law and policy advocacy and are therefore often left out of rule of law programming engaging Civil Society Organizations (CSOs). DPOs are not identified as target constituents in constitutional drafting exercises. Therefore, DPOs cannot become technical assistance providers, such as experts in constitutional law, international human rights, criminal justice reform, administrative law, civil law, and criminal law. Also, gender rights programs do not possess disability law and policy expertise and therefore leave disability out of their assessments, law reforms and other work product. There is a general absence of free legal services for persons with disabilities with expertise in disability law issues and in how to work with and serve clients with disabilities. Transitional justice mechanisms do not make accommodations to ensure the participation of persons with disabilities in their processes (e.g., communication barriers, physical barriers, transportation barriers) and attitudinal barriers.

VI. STRATEGIES FOR ACHIEVING INCLUSION OF DISABLED PERSONS IN RULE OF LAW PROGRAMMING¹²⁷

International donors and implementing partners clearly must and indeed can, take steps to integrate persons with disabilities into rule of law and justice programming. Some simple steps include the following, described below.

A. Legal Analysis, Research, and Institution Reform

Ensure that legal analyses and research includes coverage of disability issues consistent with international human rights standards on disability, especially those enumerated in the CRPD.

Perform disability-focused reviews of laws to identify and repeal or amend discriminatory legislation, regulations, policies, or practices expressly barring persons with disabilities from being witnesses, jurors, judges, or lawyers, in consultation with disabled persons and DPOs.

Implement programs that seek to strengthen legal protections for the human rights of persons with disabilities in conformity with international standards, especially those enumerated in the CRPD.

Ensure that the reform of judicial, legal, and regulatory frameworks (codes, laws, constitutions, etc.) is done in consultation with DPOs and consistent with international standards on disability.

127. The more detailed discussions in this article of both barriers to and approaches to improving the inclusion of persons with disabilities in rule of law programming expands upon the earlier work outlined in JANET E. LORD, JERRY MINDES, STEPHANIE ORTOLEVA, MICHAEL STEIN & ALLISON DEFRANCO, *DISABILITY INCLUSION IN DEMOCRACY AND GOVERNANCE PROGRAMMING: STRATEGIES FOR WORKING ON DISABILITY ISSUES IN DEVELOPING COUNTRIES* (2010) (on file with author).

Undertake disability audits in access to justice assessments to identify barriers and possible solutions.

Ensure that human rights institutions, such as Ombudsman offices and national human rights commissions, include persons with disabilities in their work with disadvantaged populations.

B. Training Judges, Lawyers, and other Justice Professionals

Enhance coverage of disability law in judicial professional development and access to the law programs by ensuring that disabled lawyers and judges are part of such programs.

Include a disability component in programs designed to strengthen justice sector institutions, including the judiciary, prosecutors, legal defenders, and civilian police.

C. Judges and Lawyers with Disabilities

Increase opportunities for persons with disabilities to attend law school and other legal professional education, including the provision of reasonable accommodation if necessary, and ensure that admission criteria are not discriminatory.

Foster the inclusion of disabled lawyers and judges in programs designed to strengthen independent judicial and legal professional associations.

Enhance coverage of disability law in judicial professional development and access to the law programs, ensuring that disabled lawyers and judges are part of such programs.

D. Disabled Persons and Disabled Peoples Organizations

Include persons with disabilities on human rights education training teams and other rule of law training endeavors.

Work with DPOs to improve the access to justice and the skills and knowledge necessary for disabled persons and their allies to use the justice system effectively.

Provide coverage of the CRPD in training on human rights treaty body reporting.

Ensure that human rights institutions, such as Ombudsman offices and national human rights commissions, include persons with disabilities in their work with disadvantaged populations.

E. Crime and the Criminal Justice System

Include a disability component in programs designed to strengthen justice sector institutions, including civilian police.

Provide training to police and prosecutors on working with persons with disabilities.

Ensure that police stations are accessible to persons with disabilities and that appropriate accommodations are available, such as sign language interpreters and materials in Braille or other accessible formats.

Include disabled persons and DPOs in crime prevention, community security, and civilian policing program design and implementation.

Improve the investigative capacity of police and/or prosecutors through disability awareness training.

F. Community Education and Awareness Raising

Provide coverage of the CRPD in human rights treaty body reporting training.

Increase citizen awareness of the human rights of persons with disabilities through participatory disability rights education.

Include issues of concern to persons with disabilities in media justice awareness programs.

G. Physical Access to Courts and Judicial Tribunals

Ensure that facilities, which are part of the justice sector, are accessible to persons with disabilities, especially when facilities are constructed or renovated.

Provide reasonable accommodations to witnesses and parties in the courts, tribunals and other elements of the justice system.

Develop systems to ensure that justice institutions communicate with persons with disabilities in means that are accessible to them, for example, sign language interpreters, Braille, etc.

Thus, for purposes of a discussion on the inclusion of persons with disabilities in access to justice and rule of law programming, as with all aspects of development programs, persons with disabilities must be integrated into these programs. The preamble to the CRPD provides: “(g) [e]mphasizing the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development. . . .”¹²⁸

As programs are designed, as policies are drafted, and as projects are implemented on the ground, the needs and concerns of persons with disabilities must be integrated and the involvement of persons with disabilities and DPOs must be a primary focus, consistent with international standards.

128. CRPD, *supra* note 1, pmbi., § (g).

VII. CONCLUSIONS AND RECOMMENDATIONS MOVING FORWARD

This article suggests that the use of a coherent methodology to address access to justice for persons with disabilities (drawing on the interpretation of this right under other human rights treaties and other international documents outlining the scope of the right to access to justice generally and for persons with disabilities in particular) would be helpful in proposing and elaborating a comprehensive understanding of the right for access to justice for persons with disabilities. This article has sought to explain how the CRPD Committee, state and non-state actors might take steps to: name operative denials of access to justice for persons with disabilities, identify their forms, contexts, and means of perpetuation, and describe the ways in which they harm persons with disabilities and the integrity of the justice system itself. It also articulates States Parties' normative obligations to eliminate denials of access to justice for persons with disabilities and the scope of those obligations. Furthermore, it determines whether denials of access to justice for persons with disabilities violates the rights of persons with disabilities, including corollary rights such as their right to employment or their right to transportation, or whether it constitutes a form of discrimination. If it does constitute discrimination, then available remedies are devised for the individual whose rights were violated. Lastly, to address the structural nature of the denials of access to justice for persons with disabilities, the use of temporary special measures or programs of affirmative action can be used as a remedy.

The role of the CRPD Committee in articulating and applying a coherent methodology is crucial to dismantling denial of access to justice for persons with disabilities. The CRPD Committee can articulate the nature and scope of States Parties' normative obligations to eliminate denials of access to justice through its mandates based on its examination of States Parties' periodic progress reports pursuant to the CRPD Article 35.¹²⁹ The CRPD Committee also can develop General Recommendations that elaborate the content and meaning of the CRPD pursuant to the CRPD Articles 38(b)¹³⁰ and 39.¹³¹ The CRPD Committee should consider communications from those individuals in countries that have ratified the Optional Protocol to the CRPD Optional Protocol¹³² and undertake inquiries into grave or systematic violations, pursuant to Article 6 of the CRPD Optional Protocol.¹³³ Through its Concluding Observations, the CRPD

129. *Id.* art. 35.

130. *Id.* art. 38(b).

131. *Id.* art. 39.

132. *Id.* art. 1.

133. CRPD, *supra* note 1, art. 6.

Committee can clarify and provide an authoritative interpretation of the obligations that States Parties have to eliminate denials of access to justice for persons with disabilities in a particular situation.

Under the communication and inquiry procedures of the Optional Protocol, the CRPD Committee can apply the CRPD to determine whether denials of access to justice constitute a form of discrimination against persons with disabilities, contrary to Article 3(b).¹³⁴ The CRPD Committee can also determine whether denials of access to justice violates the rights of persons with disabilities to be equal before, and under the law, and to be entitled without any discrimination to the equal, and effective protection, and equal benefit of the law under Articles 5(1) and (2).¹³⁵ The obligation to raise awareness and the elimination of stereotypes of persons with disabilities is pervasive in the justice system under Article 8¹³⁶ and the right to access to justice under Article 13.¹³⁷ The CRPD Committee also can examine corollary rights such as: the right to employment and work with respect to equal opportunity for persons with disabilities to work as lawyers and to serve as judges under Article 27;¹³⁸ and obtain legal education in law schools and learn about the structure and operations of the legal system so that they can utilize it under Article 24.¹³⁹

These procedures can be used to name denials of access to justice. They can also elaborate consequent wrongs, give concrete meaning to States Parties' obligations, determine the existence of discrimination and/or other violations based on denials of access to justice, and remedy the individual and structural wrongs of offensive denials of access to justice. Significantly, these procedures that allow the CRPD Committee to apply the CRPD to specific instances of denials of access to justice can also highlight facts and model practices that States Parties can apply to eradicate such denials of access to justice for persons with disabilities.

In order for all the players attempting to apply the CRPD to eliminate all forms of discrimination against persons with disabilities, and to ensure their exercise of their human rights and fundamental freedoms, clearer guidance on the obligations to eliminate wrongful denials of access to justice for persons with disabilities would be helpful. A useful way to achieve this goal would be for the CRPD Committee to craft a General Recommendation on the nature and scope of obligations with respect to

134. *See id.* art. 3(b).

135. *See id.* art. 5(1)–(2).

136. *See id.* art. 8.

137. *See id.* art. 13.

138. *See CRPD, supra* note 1, art. 27.

139. *See id.* art. 24.

access to justice under Articles 5, 8, 9, 12, and the primary Article on this issue, Article 13, as well as the corollary Articles 24 and 27 of the CRPD. Although the CRPD Committee currently is considering development of a separate General Recommendation on Article 9 and 12, which has yet to be developed. Guidance through a General Recommendation would enhance understanding and application of these provisions domestically and internationally. Where the nature and scope of the treaty obligation are more fully understood, courts and other treaty bodies might be more likely to rule that denials of access to justice for persons with disabilities are a form of discrimination. A comprehensive General Recommendation might make clear that the fundamental human right of access to justice is indivisible, interdependent, and interconnected with all other human rights of persons with disabilities. Where access to justice is provided, “the elimination of discrimination against persons with disabilities is generally accelerated.” As a result, there might be a more concerted effort by all players to identify the harms of denials of access to justice for persons with disabilities, and to provide information that disconfirms wrongful assumptions and stereotypes about persons with disabilities.

The CRPD Committee has a powerful opportunity to leverage its position as the international human rights treaty body responsible for monitoring compliance with the CRPD and to raise awareness of transnational approaches to eliminating wrongful denials of access to justice. Of particular importance is the need to foster understanding of how different States Parties have dismantled barriers to access to justice, overcoming barriers that are *de facto*, *de jure*, and persistent. One approach is to examine how domestic courts have found that denials of access to justice are unlawful discrimination or otherwise violate legal protections of constitutional and human rights of persons with disabilities, perhaps thereby more effectively integrating the CRPD standards into domestic court jurisprudence.

In entering into dialogue with States Parties on their periodic progress reports, individual CRPD Committee members can explore how the experiences of eliminating wrongful denials of justice to persons with disabilities in one country or sector might be applied to another country or sector. Responding to the challenge of dismantling wrongful denials of access to justice is not limited to the CRPD Committee. The specialized agencies and offices of the United Nations, such as the World Bank, the World Health Organization, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization, and the United Nations High Commissioner for Refugees, can play significant roles in reporting to the CRPD Committee how denials of access to justice

operate to deny persons with disabilities their rights in their areas of responsibility.

States Parties implementing the CRPD and reporting on the progress they have made domestically are also key players. DPOs and non-governmental organizations monitoring observance of the CRPD domestically and internationally, including their submission of shadow reports to the CRPD Committee, and their use of the communication and inquiry procedures under the Optional Protocol, are also essential. These organizations can be significant in highlighting denials of access to justice, identifying their harms and explaining both how these denials of access to justice violate the rights of persons with disabilities and what might be effective remedies for these violations.

Since access to justice is such a fundamental right to the realization by persons with disabilities of all of the civil, political, economic, social and cultural rights enumerated in the CRPD, developing a sound jurisprudence on Article 13 and related articles of the CRPD is essential to the achievement of the array of human rights enumerated in the CRPD and realizing justice and equality for persons with disabilities world-wide.